Filed 7/10/12 Pacific Western Bank v. Jenkins CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PACIFIC WESTERN BANK, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; KENNETH F. JENKINS, as Conservator, etc. Real Party in Interest.	E053622 (Super.Ct.No. INC085585) OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Randall Donald White, Judge. Petition denied.

Parker, Milliken, Clark, O'Hara & Samuelian, Larry G. Ivanjack and Gary Tokumori for Petitioner.

No appearance for Respondent.

Martina Kang Ravicz; Schlecht, Shevlin & Shoenberger, Daniel T. Johnson and John C. Shevlin for Real Party in Interest.

This case, and the interesting question that it presents, arises out of a still more interesting criminal case that has already found its way to this court on several occasions even before trial(s). Some of the tangential facts we mention have been gleaned from the records in two writ petitions. (See *Replogle v. Superior Court* (Jan. 22, 2010, E049839) [nonpub. opn.], *McCarthy v. Superior Court* (Jan. 22, 2010, E049833) [nonpub. opn.].)[1] Real party in interest Kenneth F. Jenkins (plaintiff) sues as the conservator of the estate of Clifford Edward Lambert (Lambert). In fact, Lambert is deceased, and his death is the subject of the petitions referenced *ante*, which relate to a murder prosecution against, inter alia, the petitioners in those matters. Suffice it to say that the defendants in the criminal case(s)[2] were charged with solicitation and conspiracy to commit the murder of Lambert, whose body had not been found, at least at the time the complaint in this case was filed. However, subsequent to Lambert's disappearance, several documents bearing his apparent signature were allegedly forged by one or more of the defendants. This action involves at least two powers of attorney in favor of defendant Russell Manning (Manning) purporting to have been executed by Lambert, but which plaintiff alleges were forged. Manning then allegedly used one power of attorney to transfer title to Lambert's

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[1] Court records presented by plaintiff show that David Replogle has been convicted of murder and other charges, as has codefendant Michael Bustamante.

[2] Some of whom are defendants in this case, but not involved with the petition.

residence and, pertinent to this petition, used the other to withdraw approximately $185,000 from Lambert's account with Bank

Plaintiff accordingly asserts several causes of action against Bank based upon the allegedly wrongful payout made upon presentation of the second power of attorney. Plaintiff alleges that Bank was, or should have been, familiar with Lambert's actual signature because he had cashed or endorsed a number of checks prior to his disappearance. Plaintiff asserts that the signature on the power of attorney does not match those on the checks or account agreement.[3]

Bank moved for summary judgment on the basis of Probate Code section 4303.[4] That statute provides, in pertinent part: "(a) A third person who acts in good faith reliance on a power of attorney is not liable to the principal or to any other person for so acting if all of the following requirements are satisfied: [¶] (1) The power of attorney is presented to the third person by the attorney-in-fact designated in the power of attorney. [¶] (2) The power of attorney appears on its face to be valid. [¶] (3) The power of attorney includes a notary public's certificate of acknowledgment or is signed by two witnesses." (§ 4303, subd. (a).) Bank presented evidence that the power of attorney upon which it relied was presented by Manning, the attorney-in-fact, and that it was notarized. (The latter at least is not disputed.) The power of attorney is on a form

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[3] Based on our nonexpert review, the signature on the power of attorney does not appear to be particularly similar to the undisputed signatures by Lambert.

[4] All further statutory references are to the Probate Code unless otherwise indicated.

obviously prepared for Bank's use and there is nothing "irregular" about its appearance or the manner in which it was completed.[5]

Bank also submitted a declaration by Ginger Cowan (Cowan), its bank manager, who described her receipt and review of the power of attorney presented to the Bank by Manning. Because her declaration is critical to our decision, we will directly quote the crucial parts. After describing her position with Bank, she declared that ". . . the Bank's records and files reflect that on September 23, 2008, Lambert came into the branch and opened his checking account . . . . [¶] I was present at the Palm Springs branch of the Bank and the Bank's records and files reflect that . . . on December 11, 2008, Russell M. Manning came into the . . . Bank and delivered to the Bank a Power of Attorney form signed 'Cliff Lambert'. . . . [¶] At that time, Manning indicated that Lambert had relocated to San Francisco and was very ill . . . I reviewed the Power of Attorney form . . . and noted that Lambert's signature was notarized in San Francisco County, which was consistent . . . ." She then explained that although the signatures did not "exactly" match, this was not an uncommon thing with elderly account holders, whose health might deteriorate. She also noted the fact of the notary's certificate of Lambert's identity as the person who signed the power of attorney. "Manning's identification was also confirmed against his driver's license . . . ."

[5] At the top of the page is a logo over the words "Pacific Western Bank," which in turn is printed over the words "Power of Attorney."

Plaintiff's opposition to the motion was primarily based on the legal theory that section 4303 did not apply, and that the matter was governed instead by section 5204. Unlike section 4303, which is found in division 4.5 of the Probate Code ("Powers of Attorney"), section 5204 is located in division 5 ("Nonprobate Transfers"), and is further located in part 2 of that division ("Multiple-Party Accounts"). Section 5204, subdivision (a), sets out the requirements for a "special power of attorney," which is established by its provisions "[i]n addition to a power of attorney otherwise authorized by law." This "special power" "is authorized . . . to apply to one or more accounts at a financial institution." (*Ibid*.) Hence, such a power of attorney would have been appropriate for Lambert to have prepared for, and Manning to have presented to, the Bank. Under section 5204, subdivision (b), a "special power" authorized by the statute must be in writing, must be signed by the person giving the power of attorney, and must clearly identify the attorney-in-fact, the financial institution, and the account or accounts to which it applies. Furthermore, subdivision (c) requires that such a power contain specific language cautioning the principal about the legal effects of the power of attorney.[6]

Whether a financial institution may safely rely on such a "special power" depends on different factors than those set out in section 4303. With respect to a power of attorney governed by section 5204, subdivision (f), the financial institution holding the

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[6] "'WARNING TO PERSON EXECUTING THIS DOCUMENT: This is an important legal document. It creates a power of attorney that provides the person you designate as your attorney-in-fact with the broad powers it sets forth. You have the right to terminate this power of attorney. If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.'" (§ 5204, subd. (c).)

subject accounts "may rely *in good faith* upon the validity of the power . . . if (1) the power of attorney is on file with the financial institution and the transaction is made by the attorney-in-fact named in the power, (2) the power of attorney appears on its face to be valid, and (3) *the financial institution has convincing evidence of the identity of the person signing the power of attorney as principal*." (Italics added.) "'[C]onvincing evidence'" is further defined to require *both* "[r]easonable reliance on a document that satisfies the requirement of Section 4751,"[7] and the "absence of any information, evidence, or other circumstances that would lead a reasonable person to believe that the person signing the power of attorney as principal is not the individual he or she claims to be." (§ 5204, subd. (g).)

Plaintiff argued below (and argues here) not only that 5204 applied to the exclusion of section 4303, but that Bank had failed to establish that there were no suspicious circumstances—specifically, the dissimilarity in the signatures. Plaintiff also made certain arguments with respect to Bank's showing under section 4303, in the event the trial court found it to be applicable; we will discuss these arguments as necessary.

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[7] "Section 4751" as it is referenced in section 5204, no longer exists, as it was repealed in 1999. The present section 4751 unhelpfully relates to health care decisions and reads in toto, "[t]he remedies provided in this part are cumulative and not exclusive of any other remedies provided by law."

Former section 4751 defined "convincing evidence" in the context of durable powers of attorney for health care. Among the items considered "convincing" evidence of identity were a California driver's license or state-issued identity card, a United States passport, military identification cards, and foreign documentation if additional requirements are met. For nursing home residents, representations by administrative staff or family members could be acceptable.

The trial court found that section 5204 applied, and that Bank had not satisified its requirements to the extent necessary to obtain summary judgment. This petition followed.

DISCUSSION

A.

Which Statute Applies?

The power of attorney at issue makes no effort to comply with section 5204, but it *is* drafted to comply with section 4303. Most notably, the form *required* notarization, which is one of the two ways in which a section 4303 power of attorney may be validated, and which is also arguably the strictest and most reliable way of ensuring that the name on the document is that of the person signing. By contrast, the form would *not* be valid under section 5204 because it does not contain the mandatory warnings. Although Bank, as the preparer of the form, could have chosen to use *either* the standard power of attorney or the "special power" described in section 5204, we consider it untenable to argue that Bank must be bound by the law applicable to the "special power" even though the document is clearly *invalid* as such a power, while it is also clearly *valid* as the standard power. Such a position also flies in the face of common sense, as it is obvious that an institution such as the Bank would attempt to place itself under the more protective provisions of section 4303.

Plaintiff argues that because the power of attorney "neither incorporates nor refers to division 4.5 of the Probate Code," it cannot be governed by section 4303. Well, it doesn't "incorporate or refer to" division 5 either. Plaintiff points out that the power of

attorney is not a "durable power" under the general law because it expressly terminates when the Bank receives notice of the death or incapacitation of the principal. (See § 4124.) It is not a durable power of attorney under section 5204 either.[8] Plaintiff cites no authority for the proposition that a document must include a reference to the statute under which it is created in order to be valid under a given law. Again, we are compelled to note that the document does not refer to section 5204 either.[9]

Of course, this analysis rejects the position that plaintiff asserts—that section 5204 *preempts* the general power of attorney law with respect to powers given in connection with accounts at banks or other financial institutions. But section 5204, subdivision (k), expressly provides that "[n]othing in this section limits the use or effect of any other form of power of attorney for transactions with a financial institution." Section 5204 is designed to make a "do it yourself" power of attorney simple enough for anyone to execute without the "bother" of notarization or even finding witnesses. (See *Stevens v. Tri Counties Bank* (2009) 177 Cal.App.4th 236, 244 [the purpose of the "Multi-Party

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[8] Section 5204, subdivision (d), requires a further warning: "In addition to the language required by subdivision (c), special powers of attorney that are or may be durable shall also contain substantially the following language: [¶] '[t]hese powers of attorney shall continue even if you later become disabled or incapacitated.'" No such language, of course, appears in the subject power of attorney.

[9] Bank also makes some arguments, which lack substantial merit. It asserts in its "reply to return" that the document cannot be a section 5204 power of attorney because Lambert's account was not "multi-party." Our reading of section 5204 and the "Multi-Party Accounts" law in general indicates that the Legislature simply considered any account as to which a third party had been nominated as attorney-in-fact to be a "multi-party account." That is, there are multiple parties once the power of attorney is in effect. Nothing whatsoever suggests that section 5204 is intended to apply only to accounts that *already* had joint or multiple owners.

Accounts" law is to simplify nonprobate transfers after death].) Instead, it places the onus on the financial institution to ensure that a "special power" signed by "John Jones" really *was* signed by John Jones, by "convincing evidence." By contrast, section 4303 requires the *principal* to obtain validation of his signature either by notarization or two witnesses. From the point of view of a financial institution, this is obviously the safer way to go because it may rely on the notary (for a notarized form) to have done the detective work and verification. Nothing in section 5204 prohibits a financial institution and its customers from using a power of attorney drafted under the general law.

Plaintiff also argues that because section 5204 applies only to "financial institutions," while section 4303 is not so limited, the "convincing evidence" requirement of the former should be imported into the latter. As we have explained, the two statutes serve different purposes and achieve their goals (protection of all parties) by different means. There is no reason to imply portions of section 5204 into section 4303, and we decline to do so.

Casting his net ever more widely, plaintiff points to Financial Code sections 40500 and 40501. The former merely prohibits a financial institution from transferring funds from a depositor's account without authorization, while the latter similarly prohibits the release of funds "to any person or entity who is not the account holder, unless the funds are released pursuant to the depositor's authorization or in accordance with the law." (Fin. Code, § 40501.) He argues that these statutes (which have garnered no appellate attention) somehow splice additional requirements and liabilities into Probate Code section 4303—in essence eviscerating the protections of that law. "The Real Party In

Interest submits that these statutes imposed an affirmative obligation on the Petitioner to do everything it could to assure that the 'SUBJECT DOCUMENT' was authentic." We disagree. Both the "Power of Attorney" and the "Multi-Party Accounts" laws prescribe specific rules for specific situations, and must therefore be held to prevail over the general obligations set out in the Financial Code. (See, e.g., *People v. Campos* (2011) 196 Cal.App.4th 438, 453.) Probate Code sections 4303 and 5204 are *both* clear: A financial institution is protected if it accepts a qualified document and it acts in good faith. No further duty exists.[10]

We now turn to plaintiff's arguments with respect to the propriety of granting Bank's motion even if section 4303 applies.

B.

Bank Is Not Entitled to Summary Judgment

Despite our conclusion *ante*, we are compelled to hold that Bank failed to carry its burden of establishing its right to summary judgment. In other words, the trial court's ruling was correct, albeit for the wrong reason.

In order to rely on the immunity from liability, Bank was required to establish that the power of attorney was actually presented by Manning, the attorney-in-fact. (See § 4303, subd. (a)(1).) We agree that the declaration of Cowan does not reflect "personal

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[10] Plaintiff objects that this construction would allow a bank to allow funds to be withdrawn based on the authority of a power of attorney known to be forged. Not so. As we have noted, section 4303, subdivision (a), only protects the financial institution that acts "in good faith reliance" on the document.

knowledge" because it does not unambiguously state that Cowan was the one who reviewed the presenter's identification. She states only that she spoke with the presenter and "reviewed the Power of Attorney form," but not that she personally confirmed the presenter's identity. Although the power of attorney form does bear a driver's license number, it is not clear who wrote this number and it certainly was not established that the number does in fact belong to Manning. Cowan merely declares that "Manning's identification was also confirmed against his driver's license," but does not say by whom or how she knows this. Hence, viewed under the strict standards applicable to a moving party's evidence (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143), Cowan's declaration failed to competently establish that Manning's identify was properly verified.

Plaintiff also correctly argues that the Bank failed to establish its good faith reliance on the power of attorney (see Prob. Code, § 4303, subd. (a)) although it was on its face properly notarized. We agree that good faith must be separately established from the three objective requirements set out in the statute. Subdivision (e) of Code of Civil Procedure section 437c allows the trial court to decline to credit a declaration insofar as it sets out the declarant's state of mind. Of course in this case, the trial court did not make such a discretionary determination because it applied Probate Code section 5204 instead. However, the fundamental difficulty is that Cowan's declaration does not expressly affirm that she believed the power was legitimate. Her declaration merely reflects that "*The Bank* relied on the official acknowledgement and seal of the Notary Public on the Power of Attorney. . . ." (Italics added.) If "The Bank" was in fact Cowan, the

declaration should have been drafted to make this clear. Furthermore, while Cowan does indicate that the discrepancy between Lambert's signature on the account forms and on the power of attorney could be explained by ill health, she does not state that she *in fact* believed this to be the explanation. Again, construing her declaration strictly, it is not sufficient.

DISPOSITION

Accordingly, although we agree with petitioner's legal argument that the power of attorney in question fell under section 4303 because its evidentiary showing was insufficient to show that all of the requirements of the statute had been satisfied, the trial court's ruling denying its motion for summary judgment was correct. The petition is denied.

In light of our decision, the parties shall bear their own costs. The stay previously ordered is lifted.

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MILLER
Acting P. J.

We concur:

McKINSTER
J.

KING
J.